BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JASON A. MOORE Claimant	)	
VS.	)	
UNITED PARCEL SERVICE, INC. Respondent	)	Docket Nos. 1,025,359 & 1,025,360
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the February 1, 2006, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

The Administrative Law Judge (ALJ) ordered respondent to provide further medical treatment for claimant in accordance with the findings of Dr. Thomas Shriwise. The ALJ did not order temporary total disability benefits because there was no request for the same in the application for the preliminary hearing. However, the ALJ suggested respondent pay temporary total disability benefits for those periods during which claimant is off work and under active treatment by the authorized treating physician.

Respondent requests that the Board deny compensation in this case because claimant failed to meet the burden of proving that he sustained an accident at work causing the need for the surgery ordered by the ALJ. Respondent claims that Dr. Shriwise's report is suspect because it reflects that claimant's first onset of knee pain in 1999 and subsequent surgery occurred while claimant was employed by respondent and that claimant's first work-related accident occurred on February 11, 2004, both of which were incorrect statements. Respondent further states that nothing in the records of Dr. Jon Browne, claimant's treating physician, reflects that claimant's return to work after February 2005 accelerated, aggravated or intensified his need for surgery.

Claimant requests that the Board affirm the decision of the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is claiming two compensable injuries while working for respondent. In Docket No. 1,025,359, he is claiming a series of repetitive accidents through March 12, 2004, which aggravated a preexisting knee condition. In Docket No. 1,025,360, he is claiming a series of repetitive accidents to September 19, 2005, and continuing. On September 29, 2005, claimant filed an Application for Preliminary Hearing in both docketed cases requesting authorized medical treatment.

Claimant started working part time as a loader at respondent in November 2000. As a loader he scanned packages and loaded them into a trailer. Loading packages required him to lift, bend, pivot and squat on a repetitive basis.

In 1999, before starting to work at respondent, claimant's left knee swelled up and began to hurt. He had not fallen or had any type of traumatic accident that caused the knee to swell. In September 1999, he had arthroscopic knee surgery performed by Dr. Robert M. Murphy. Dr. Murphy removed some loose fragments in claimant's knee, and the knee returned to normal. Dr. Murphy's notes of October 18, 1999, indicate that claimant was walking with a normal gait at that time.

Claimant's knee was not bothering him when he started working at respondent in 2000. He was initially assigned to loading a low volume trailer. Sometime in 2001 or 2002, however, he was transferred to Lenexa and was a loader on a high volume trailer. On March 17, 2004, he had finished loading a trailer and was walking away, when he took a step and his knee locked up on him. His knee had started bothering him two to three months before that and had been grinding, popping and swelling. The months of November and December are the busiest, and claimant believes it was this activity that caused increased problems with his knee.

Claimant worked nights, and his supervisor was not there when the incident on March 17, 2004, occurred. He went to his personal physician, Dr. Fred Rice, that morning and then called the Human Relations Department at respondent and reported that he had hurt his knee at work. He was told to call his personal health insurance carrier. He had never had a workers compensation claim before and followed the instructions from the Human Relations Department.

Claimant did not return to work after March 17, 2004, as Dr. Rice took him off work. He was eventually referred to Dr. Browne, who performed surgery on his left knee in

August 2004. The cost of this procedure was covered by claimant's personal health insurance carrier. Claimant testified that Dr. Browne performed arthroscopic knee surgery and took out three bone chips about the size of 50 cent pieces. Dr. Browne also harvested some cells for cartilage implantation. Claimant followed up with Dr. Browne on September 10, 2004. Dr. Browne's notes on that date indicate that claimant was going to get approval from his personal health insurance carrier to have the implantation surgery. Although Dr. Browne recommended additional surgery for cartilage implantation, claimant had not heard from his personal health insurance carrier approving the procedure, and Dr. Browne released him to return to work on December 20, 2004.

After his release by Dr. Browne, claimant's knee was stronger and he could walk without his knee popping. Even though Dr. Browne released claimant, respondent required that claimant see their company doctor, Dr. Gary Legler. Claimant saw Dr. Legler on January 11, 2005, and Dr. Legler released claimant to full duty with no restrictions. Claimant went back to work on February 5, 2005. Before he started back to work, he requested a transfer to a low volume trailer; and his transfer was granted. He was able to perform his job duties with no problems. In April 2005, however, he was returned to a high volume trailer. After awhile, his knee began to hurt again. He said when working a high volume trailer, he would handle from 1,200 to 1,500 packages, which is about 3 times more than working a low volume trailer. Respondent has policies and procedures concerning using the correct way to lift a package by keeping the back straight and lifting with the legs; and this is very hard on the knees.

Claimant told several people, including his immediate part-time supervisor and Barbara Heying, the person in charge of health and safety, that his work in the high volume trailer was making his knee condition worse. He had a union steward with him to witness the conversations. He requested that he be transferred from the high volume trailer to a lower volume trailer because of the problems with his knee. Nothing was done in response to his complaints. He asked to be sent to a doctor, and Ms. Heying refused, telling him that she could not help it if he had a bad knee.

On August 1, 2005, claimant went to the emergency room of Providence Medical Center on his own because his knee was swollen and was burning and popping. He had already been turned down for additional treatment by respondent. At the emergency room, he complained of chronic knee pain, which was getting worse. Claimant testified that his pain was worse than when he first went off work in March 2004.

Claimant's attorney sent him to see Dr. Thomas Shriwise on November 4, 2005. Dr. Shriwise's report references an episode on February 11, 2004, of claimant's knee locking. Claimant testified, however, that when reciting his history, he could not remember an exact date, and Dr. Shriwise told him the exact date did not matter. Claimant testified that the locking incident actually occurred on March 17, 2004, the date he went to see Dr. Rice. Dr. Shriwise recommended the additional surgery suggested by Dr. Browne and

gave claimant work restrictions. When claimant told respondent about the restrictions, he was laid off. Claimant's last day of work was November 4, 2005.

Claimant's knee still hurts, though not as badly because he is not loading high volume trailers. At times he still ices it and takes Tylenol for the pain.

Barbara Heying is the health and safety specialist at respondent. She did not remember when she first talked to claimant, but she recalls him telling her his knee was bothering him and that he needed surgery again. She told him he needed to see his own doctor because it was from his knee surgery. She said claimant did not specifically tell her that his knee was being aggravated by working in a high volume trailer. She did not ask him if his condition was related to his work because he had the knee surgery from a prior injury and said he needed another knee surgery to make it better.

In September 2005, claimant told Ms. Heying that his knee was hurting him and it was work related. He said the accident occurred in 2004 and asked to fill out an accident report. At that point, she said a "red flag" went up for her because she knew he had a prior knee surgery. She filled out an accident report but did not send him to see the company doctor.

Tom Treece is a full time employee of respondent. He works in the same building and same shift as claimant. In the summer of 2005, he was a union steward at respondent. Sometime in the fall of 2005, claimant came to him and asked what he needed to do in regard to his knee injury. Mr. Treece told him to report the injury to his immediate supervisor and to Ms. Heying, the safety person. Mr. Treece accompanied claimant to see Ms. Heying. Claimant told Ms. Heying that he had aggravated his knee, that his knee needed to be looked at, and that he wanted to file a report. Ms. Heying told claimant that his knee condition was an old injury and was not something that would be a workers compensation injury. Mr. Treece testified that claimant told Ms. Heying that his current work in the high volume trailer was making his knee condition worse.

Sometime later, claimant again approached Mr. Treece and had a doctor's note with a 40-pound weight restriction. Although Mr. Treece was not a union steward at that time, he again took claimant to see Ms. Heying, and Ms. Heying told both of them that claimant's claim would be denied as a workers compensation claim. Ms. Heying testified that she has no memory of visiting with claimant and Mr. Treece.

Moore Paialii is a manager for a hub sort for respondent and supervises the people who supervise claimant. At the time claimant transferred to his hub, he did not know that claimant was returning from having knee surgery.

Mr. Paialii talked with claimant and Mike Wilson, a union steward, in November 2005. At that time, claimant was complaining about the trailer loading being too heavy for

him and that it was making his knee hurt. This was the first time Mr. Paialii knew that working was causing claimant's knee to hurt. Mr. Paialii told claimant that anywhere else he went would be worse, as he was loading one of the lowest volume trailers. Mr. Paialii stated that all packages weigh from zero to 70 pounds. Employees in claimant's position are required to load a certain number of packages. If they load a trailer and are still on shift, they are transferred to another trailer.

Mr. Wilson is a dock worker for respondent and is also a union steward. He works in the same building with claimant. Mr. Wilson stated he met with claimant and Manny Aquino, who is Moore Paialii's right-hand man, in late August 2005. He was paged into the hub office, and when he got there, claimant and Mr. Aquino were already conversing. Claimant was in the process of voicing a grievance, complaining that his knees were being subjected to unnecessary damage due to the nature of his job. Claimant wanted to be moved to a lighter trailer or wanted someone to be in the trailer with him to help load. Mr. Aquino did not give a yes or no answer, and a decision was left for a later time. There was no paperwork of the meeting because no grievance was filed.

While it is uncontroverted that claimant sustained previous knee injuries, the evidence contained within the record supports claimant's contention that his work with respondent caused an aggravation of his underlying condition. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[1] The test is not whether the job-related activity or injury caused the condition, but whether the job-related activity or injury aggravated or accelerated the condition.[2] Accordingly, claimant's claim is compensable.

The Board finds claimant suffered personal injury by accident arising out of and in the course of his employment with respondent through November 4, 2005. Accordingly, claimant is entitled to authorized medical treatment for the work-related aggravation of his preexisting condition.

WHEREFORE, it is the finding, decision and order of the Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated February 1, 2006, is affirmed.

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[1] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[2] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

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BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director